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5 In the Matter of

6 THE APPLICATION REGARDING
7 THE CONVERSION AND
8 ACQUISITION OF CONTROL OF
9 PREMERA BLUE CROSS AND ITS
10 AFFILIATES

No. G02-45

OIC STAFF'S RESPONSE TO
PREMERA'S MOTION FOR
PARTIAL RECONSIDERATION
AND CLARIFICATION

11 I. BACKGROUND

12 On September 17, 2002, PREMERA filed a Form A application ("Application")
13 requesting the approval of the Commissioner of Insurance for certain transactions designed to
14 result in the conversion of PREMERA, and certain of its subsidiaries or affiliates, from non-
15 profit to for-profit status under chapters 48.31B and 48.31C RCW. In connection with review
16 of the Application, the OIC Staff ("Staff") has issued two deficiency letters and, through its
17 consultants retained to assist in the review, two information requests. PREMERA has
18 supplemented the Application on several occasions and has made available a portion of the
19 requested information for review by the Staff's consultants.

20 RCW 48.31B.015(4)(b) and 48.31C.030(4) provide for an adjudicative hearing in
21 connection with consideration of the Application. Pursuant to the authority granted a
22 presiding officer in an adjudicative proceeding, the Commissioner issued a Case Management
23 Order on October 24, 2002 ("Order"), dealing with a number of procedural and housekeeping
24 matters relating to this proceeding. *See* RCW 34.05.431; 34.05.449; WAC 10-08-130; 10-08-
25 200. In this connection, the Order states that "[t]he Application will not be considered
26 complete until the adjudicative hearing has concluded and the administrative record is

1 closed.” Order at 2 ¶ 1. By way of its Motion for Partial Reconsideration and Clarification
2 (“Motion”), PREMERA requests the Commissioner to amend the Order by modifying the
3 language of the Order to reflect that the entire review process must be concluded within a
4 period of time that permits the issuance of a determination within sixty days after the
5 Application is complete. Motion at 12. PREMERA urges that the sixty-day time limits found
6 in RCW 48.31B.015(4)(b) and 48.31C.030(4) are mandatory requiring strict compliance.
7 Motion at 11.

8 RCW 48.31B.015(4)(b) provides as follows:

9 The commissioner shall approve an exchange or other acquisition of control referred
10 to in this section within sixty days after he or she declares the statement filed under
11 this section to be complete and after holding a public hearing. At the hearing, the
12 person filing the statement, the insurer, and any person whose significant interest is
13 determined by the commissioner to be affected may present evidence, examine and
14 cross-examine witnesses, and offer oral and written arguments and in connection
15 therewith may conduct discovery proceedings in the same manner as is allowed in the
16 superior court of this state. All discovery proceedings must be concluded not later
17 than three days before the commencement of the public hearing.

18 RCW 48.31C.030(4) provides as follows:

19 The commissioner shall approve an exchange or other acquisition of control referred
20 to in this section within sixty days after he or she declares the statement filed under
21 this section to be complete and if a hearing is requested by the commissioner or either
22 party to the transaction, after holding a public hearing. Unless the commissioner
23 declares the statement to be incomplete and requests additional information, the
24 statement is deemed complete sixty days after receipt of the statement by the
25 commissioner. If the commissioner declares the statement to be incomplete and
26 requests additional information, the sixty-day time period in which the statement is
deemed complete shall be tolled until fifteen days after receipt by the commissioner of
the additional information. If the commissioner declares the statement to be
incomplete, the commissioner shall promptly notify the person filing the statement of
the filing deficiencies and shall set forth with specificity the additional information
required to make the filing complete. At the hearing, the person filing the statement,
the health carrier, and any person whose significant interest is determined by the
commissioner to be affected may present evidence, examine and cross-examine
witnesses, and offer oral and written arguments, and in connection therewith may
conduct discovery proceedings in the same manner as is allowed in the superior court
of this state. All discovery proceedings must be concluded not later than three business
days before the commencement of the public hearing.

27 The implementing regulations make no reference to the time limits set forth in these
28 statutory provisions. *See* chaps. 284-18, 284-18A WAC.

II. DISCUSSION

A. The sixty-day time limit for the Commissioner's determination begins to run only after both the statement is complete and after the public hearing has been held.

Although the provisions in question are similar in structure and purpose, there are marked differences. Chapter 48.31B RCW applies to “insurers” in general; chapter 48.31C RCW to health care service contractors and health maintenance organizations. *See* RCW 48.31B.005(4); 48.31C.010(4). A public hearing is required in all cases under RCW 48.31B.015(4)(b) while under RCW 48.31C.030(4) a public hearing is only required if a hearing is requested “by the commissioner or either party to the transaction.” Only RCW 48.31C.030(4) contains a provision that deems a statement to be complete sixty days after receipt unless the Commissioner declares the statement to be incomplete and requests additional information. This subsection also contains a provision that, in effect, lengthens the sixty-day time limit an extra fifteen days after receipt of additional information. RCW 48.31C.030(4) requires the Commissioner to promptly notify the applicant of any deficiencies in an application and to be specific about what further information is required. RCW 48.31B.015 has no equivalent language. Finally, the statutes were not enacted during the same legislative session. Chapter 48.31B RCW is older having first appeared in 1993. Chapt. 462, 1993 Wash. Laws. Chapter 48.31C RCW was enacted in 2001 and seems in large part to have been patterned after the older provision. Chapt. 179, 2001 Wash. Laws.

PREMERA has argued that the time limit requires that the adjudicative hearing and all related proceedings must be concluded in time to permit the Commissioner to issue a determination with sixty days of the date the statement is complete. Motion at 12. This construction does not take into consideration the use by the legislature of the coordinating conjunction “and.” RCW 48.31B.015(4)(b) requires that the determination be made “within sixty days **after** he or she declares the statement ... to be complete **and after** holding a public hearing.” (Emphasis added.) Similarly, RCW 48.31C.030(4) requires that the determination

1 be made “within sixty days **after** he or she declares the statement ... to be complete **and** if a
2 hearing is requested by the commissioner or either party to the transaction, **after** holding a
3 public hearing.” (Emphasis added.) In both instances, the legislature linked the prepositional
4 phrase “within sixty days” to two other prepositional phrases using “and” to connect events
5 that are to be treated with equal importance. Thus, both events must occur before the sixty
6 days begins to run. If, under RCW 48.31C.030(4), a public hearing is not requested, then the
7 sixty days runs from the date the statement is declared to be complete or deemed to be
8 complete, whichever occurs first. But to give effect to the legislative intent, both the
9 determination that the statement is complete and the closing of the public hearing must occur
10 before the time limit begins to run.

11 Under 48.31B.015(4)(b), the Application is complete only when the Commissioner
12 declares it to be so. Clearly, the language in the Order to which PREMERA objects is not
13 inconsistent with this provision. The legislature has lodged this determination squarely within
14 the Commissioner’s discretion. In the exercise of that discretion, the Commissioner has
15 declared in the Order when the Application will be deemed complete.

16 Under 48.31C.030(4), the legislature granted the Commissioner identical discretion in
17 making this determination but added a deemer clause to apply in the event that the
18 Commissioner failed to act on an application in a timely manner. Where the Commissioner
19 neither declares an application complete nor requests additional information, the application is
20 deemed complete after sixty days have elapsed from the date of receipt of the application. At
21 that point, subject to receipt of a request for a public hearing, the sixty-day period for the
22 Commissioner’s determination begins to run. If no hearing is requested, the determination is
23 due within sixty days of the date the application was deemed complete. The statute is silent as
24 to the consequences if the Commissioner fails to issue a determination within that period.

25 If a hearing is requested, in accord with RCW 48.31B.015(4)(b), the sixty days does
26 not begin to run until after the public hearing is concluded. The legislature elected not to limit

1 the time for a party to request a public hearing under this provision. Thus, it is possible that a
2 party could delay its request for a public hearing to the 59th day of the time limit for
3 determination and the Commissioner would be required to grant the request resulting in the
4 timelines running anew after conclusion of the hearing process. In any case, where the
5 Commissioner has made a determination, a party may request a hearing under chapters 34.05
6 and 48.04 RCW. RCW 48.31C.140. *See also* RCW 48.31B.070.

7 The portion of the Order found objectionable by PREMERA is not inconsistent with
8 this provision. The Commissioner retains the authority to declare whether the Application is
9 complete and to request additional information. Certainly, the language in the Order
10 constitutes a declaration that the Application is not complete. In addition, as evidenced by the
11 attached Declaration of James T. Odiorne, the Staff has determined that the Application is
12 incomplete and has requested PREMERA to provide additional information.

13 Moreover, the Commissioner's determination that the Application will not be deemed
14 complete until the conclusion of the hearings process makes good common sense and is
15 consistent with public policy. During the hearing, it is anticipated that PREMERA will be
16 presented with, and be required to respond to, concerns and objections by parties in the
17 proceeding. It is reasonable and consistent with ensuring meaningful participation of those
18 accorded party status that the Commissioner not declare the Application complete until
19 PREMERA has responded to those concerns and objections.

20 B. The sixty-day time limit for the Commissioner's determination is directory rather
21 than mandatory; therefore, strict adherence to the time limit is not required.

22 1. To determine whether statutory language is directory or mandatory,
23 legislative intent must be ascertained.

24 The legislature used the word "shall" in both provisions. While the ordinary sense of
25 the word "shall" is "imperative and operates to create a duty," any inquiry must determine the
26 intent of the legislature under the ordinary rules of statutory construction. *Washington State*

1 *Liquor Control Bd. v. Washington State Personnel Bd.*, 88 Wn.2d 368, 377 (1977). “[T]he
2 prime object is to ascertain the legislative intent as disclosed by all terms and provisions of the
3 act in relation to the subject of legislation, and by a consideration of the nature of the act, the
4 general object to be accomplished, and the consequences that would result from constructing
5 the particular statute in one way or another.” *Spokane County ex. rel. Sullivan v. Glover*, 2
6 Wn.2d 162, 169 (1940).

7 A mandatory provision in a statute is one which, if not followed, renders the proceeding
8 to which it relates illegal and void; a directory provision is one the observance of which
is not necessary to the validity of the proceeding.

9 *Id.* The provision must be read “within the context of the regulatory and statutory scheme as a
10 whole.” *ITT Rayonier, Inc. v. Dalman*, 122 Wn.2d 801, 807 (1993).

- 11 2. Making the provisions of the Administrative Procedure Act applicable to
12 public hearings conducted under RCW 48.31B.015(4)(b) and
13 48.31C.030(4) and granting the Commissioner the authority to allow
intervention, reveals that the legislature did not intend the sixty-day limit to
be mandatory.

14 The Administrative Procedure Act, chapter 34.05 RCW, governs all public hearings
15 held under RCW 48.31B.015(4)(b) and 48.31C.030(4). RCW 48.04.010(1)(a); WAC 284-02-
16 070(1)(a). *See also* RCW 34.05.010(1). Thus, the due process protections and procedural
17 devices found in the act were intended by the legislature to apply to and be utilized by the
18 parties in such proceedings. Many of the provisions establish requirements or provide for the
19 exercise of discretion by the Commissioner that could result in extending the duration of
20 proceedings beyond sixty days; a result that would be inconsistent with PREMERA’s
21 construction of the provisions. *See, e.g.*, RCW 34.05.434(1) (requires not less than seven days’
22 advance written notice of hearing to all parties and all persons filing petitions to intervene);
23 34.05.437 (parties must be afforded “full opportunity” to submit and respond to pleadings,
24 motions, objections, and offers of settlement); 34.05.443 (interventions permitted); 34.05.446
25 (use by the parties of discovery authorized as established in rules 26 through 36 of the superior
26 court civil rules); 34.05.461(8)(a) (final order is to be served within ninety days of conclusion

1 of hearing or after submission of memos, briefs, or proposed findings). In addition, other
2 applicable statutory and regulatory provisions grant the Commissioner discretion that may
3 potentially conflict with PREMERA's strict interpretation of the statutes. *See, e.g.*, RCW
4 48.04.060 (Commissioner may continue hearings); WAC 10-08-090 (continuances permitted
5 on showing of good cause).

6 Both RCW 48.31B.015(4)(b) and 48.31C.030(4) expressly authorize the Commissioner
7 to permit persons to participate as parties in the proceedings upon a determination that the
8 persons possess a "significant interest ... affected" by the transaction. They may conduct
9 discovery as allowed under the superior court rules but it must be concluded three days prior to
10 the commencement of the hearing.

11 The legislature was certainly aware that in implementing these provisions, it may
12 become necessary for the Commissioner to continue the proceedings in excess of sixty days to
13 adequately protect the rights and consider the interests of the parties. PREMERA's
14 construction of the provisions does not provide the parties any leeway in the event
15 circumstances arise that constitute good cause for an extension of time.

16 3. PREMERA has failed to consider the consequences of noncompliance.

17 The Motion contains no discussion of the consequences were the Commissioner not to
18 render a decision within sixty days from the date the statement is complete. This is clearly an
19 important component in ascertaining legislative intent. *Spokane County*, 2 Wn.2d at 169.
20 PREMERA merely repeatedly asserts that compliance is required. Motion at 8, 9, 11-12.

21 PREMERA does cite *Erection Company v. Department of Labor and Industries*, 121
22 Wn.2d 513 (1993), for the proposition that failure to comply with a statutory time period
23 resulted in an agency losing jurisdiction. Motion at 10. In that case, the Supreme Court held
24 that a time limit for reassuming jurisdiction by the Department of Labor and Industries over a
25 case was mandatory and the Department's failure to comply resulted in rendering its
26 subsequent redetermination order invalid. *Erection Co.*, 121 Wn.2d at 523. The Court found

1 compelling two indicators of the legislative intent: the time limit was specifically established in
2 a “jurisdictional context;” and use of the words “may” and “shall” in the provision revealed an
3 intent that each word have a different meaning; “may” being directory and “shall” being
4 mandatory. *Id.* at 518-519. Neither of these indicators is present here. The provisions make
5 no reference to jurisdiction. Rather, RCW 48.31B.015 and 48.31C.030 are discretionary in
6 context -- broad authority has been granted to the Commissioner with respect to consideration
7 of the Application under chapters 48.31B and 48.31C RCW. The provisions do not limit the
8 Commissioner’s discretion and are wholly silent with respect to the consequences in the event
9 of noncompliance. *See ITT Rayonier, Inc.*, 122 Wn.2d at 807 (provision not intended to limit
10 director’s discretion).

11 PREMERA also cites in support of its statutory construction a grading permit case and
12 a plat application case. Motion at 8. Both arose under regulatory systems that bear no
13 similarity to that established for the regulation of the insurance industry. *Mission Springs, Inc.*
14 *v. Spokane*, 134 Wn.2d 947 (1998), involved the withholding of the issuance of a grading
15 permit in contravention of the relevant ordinance criteria. Once the zone classifications are set
16 by ordinance, the granting of a permit is a matter of right so long as the applicant complies
17 with the requirements and pays the fee. *Id.* at 960-961. Administration of the ordinance is
18 ministerial; the exercise of discretion begins and ends with the enactment of the ordinance. *Id.*
19 There is nothing ministerial about the review process under RCW 48.31B.015 and 48.31C.030.

20 *Norco Construction, Inc. v. King County*, 97 Wn.2d 680 (1982), involved the misuse of
21 land use control powers through unwarranted delay in acting on a plat application that fully
22 complied with the relevant ordinance criteria. *Id.* at 685-687. No serious attempt was made by
23 any party in that case to argue that the statutory time limit was not mandatory. *Id.* at 687.

1 4. The legislature did not intend that the time limit be applied in a manner that
2 frustrates the purpose of RCW 48.31B.015 and 48.31C.030.

3 Chapters 48.31B and 48.31C RCW establish parameters within which the
4 Commissioner has broad discretion for approving or disapproving certain regulated
5 transactions. *See, e.g.*, RCW 48.31B.015(4)(a), 48.31C.030(5). Exercise of judgment is
6 essential considering the complexity and changeability of the insurance industry which the
7 Commissioner is charged with overseeing. A “one-size-fits-all” approach to reviewing
8 transactions is not appropriate and was never intended by the legislature. This is particularly
9 true in this matter in view of the unique character of the Application and the potential impact
10 that approval or disapproval will have on the public and the industry. The legislature did not
11 intend that the Commissioner’s evaluative process be arbitrarily cutoff due to the expiration of
12 a time limit or that it be conducted under circumstances that, due to artificial time limitations,
13 would prevent adequate review and analysis. Such is inconsistent with the broad grant of
14 authority and would defeat the very purpose for which these chapters were enacted. *See ITT*
15 *Rayonier, Inc.*, 122 Wn.2d at 808.

16 In addition, the legislature included in the process a right to a public hearing and
17 permitted members of the public to participate who could demonstrate they possess a
18 significant interest that would be affected by the transaction. Application of the time limits in
19 the manner suggested by PREMERA could result in nullifying the legislature’s attempt to
20 protect the rights of interested parties either as interveners or as parties in an adjudicative
21 proceeding under chapter 34.05 RCW. Clearly, the legislature did not consider that rights it
22 had attempted to protect be terminated through no fault of the protected parties. *See Giles v.*
23 *Dept. of Social & Health Services*, 90 Wn.2d 457, 460 (1978) (where the personnel board
24 failed to hear the appeal within the prescribed time, treatment of the provision as mandatory
25 would have denied the employee his legislatively-mandated right of appeal); *Washington State*
26 *Liquor Control Bd.*, 88 Wn.2d at 377-378 (concluding that the provision was mandatory would

1 result in the right of appeal – the main purpose of the statute – being extinguished); *Hazel v.*
2 *Van Beek*, 85 Wn. App. 129, 135 (Div. 1, 1997) (carefully drawn statutory protections were
3 inconsistent with construction of a time limit as an absolute bar to consideration of objections
4 to a sheriff's sale of real property); *Ticeson v. Dept. of Social & Health Services*, 19 Wn. App.
5 489, 492 (Div. 1, 1978) (neither party should be penalized for the failure of the personnel
6 board to function in a timely manner).

7 At most, use of the language reflects a legislative concern that the quasi-judicial
8 function be promptly performed. *See Ticeson*, 19 Wn. App. at 492-493.

9 C. Assuming for the purpose of argument only that PREMERA's statutory
10 construction is correct, the Application is not complete.

11 As evidenced by the Declaration of James T. Odiorne, attached hereto and
12 incorporated herein by reference, several requests for additional information have been
13 submitted to PREMERA and PREMERA has provided some of the information but not all has
14 yet been furnished. The requests constitute a determination that the Application is not
15 complete. Under RCW 48.31B.015(4)(b), the sixty-day limit does not run until the
16 commissioner determines that the Application is complete. Under RCW 48.31C.030(4), the
17 sixty-day period is tolled until 15 days after receipt of the requested information.

18 D. PREMERA has failed to show prejudice due to any anticipated delay.

19 PREMERA has made no attempt to show prejudice due to any perceived delay
20 resulting from the failure to adhere to the sixty-day limit. For example, there is no evidence
21 of a contractual deadline for an acquisition agreement that, if not met, would result in the
22 unwinding of the proposed transaction. PREMERA should be required to show expected
23 harm resulting from any failure to strictly adhere to the sixty-day limit. *See Giles*, 90 Wn.2d
24 at 460. Where a party is able to show prejudice as the result of undue delay, the presiding
25 officer may establish a schedule that results in expediting the hearings process. *See, e.g.,*
26

1 RCW 34.05.431; 34.05.449; WAC 10-08-130; 10-08-200. This should adequately protect
2 PREMERA's interests.

3 **III. CONCLUSION**

4 Although the parties vigorously disagree about the proper construction of RCW
5 48.31B.015(4)(b) and 48.31C.030(4), it is not disputed that the legislature expressed its desire
6 that every reasonable effort be made to avoid unnecessary delay and conclude proceedings
7 such as this in a timely manner. The Staff is committed to complying with this desire without
8 frustrating the purpose of the statutory and regulatory scheme or sacrificing the rights and
9 entitlements of the parties.

10 The Staff requests that the Motion be denied.

11 DATED this _____ day of November, 2002.

12 Respectfully submitted,

13 OFFICE OF INSURANCE COMMISSIONER
14 STATE OF WASHINGTON

15
16 By: _____
17 John F. Hamje
18 Staff Attorney WSBA #32400
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21 360-725-7046
22 360-586-3109 (Facsimile)
23
24
25
26

CERTIFICATE OF SERVICE

Pursuant to WAC 10-08-110(3), I certify under penalty of perjury under the laws of the State of Washington that this instrument was served upon all parties of record in this proceeding by transmitting a copy thereof by FAX, and, on the same day, mailing a copy thereof, properly addressed with postage prepaid, to the attorney for each party to the proceeding.

Dated: _____, 2002
At Tumwater, Washington

John F. Hamje